they hold that a stipulation for the forfeiture of all payments previously made must have been intended in the nature of a penalty. The penalty would become more severe as fast as the vendee's performance becomes more nearly complete; the smaller his breach the greater the penalty. Therefore equity will relieve against such a forfeiture. This is true even though the parties expressly describe the forfeiture as liquidated damages. There is in fact no true liquidation or honest estimate, for the amount stipulated varies in inverse proportion to the loss actually sustained. Such a result seems to accord fair and equitable treatment to both parties. It is true that the vendee's legal status is that of a contract-breaker. He should not be entitled, therefore, to a return of his purchase money until he has allowed as a deduction therefrom all the damages caused by his breach, one element of which would be the fair rental value of the property during the time he occupied it. The law should not allow one to profit by another's breach, but merely to receive compensation for the loss sustained.[19] When the vendee has paid damages for the breach and returned the land to the vendor, the latter is sufficiently recompensed.

Although in general the vendee should be given equitable relief against a forfeiture, this does not mean that he should always be given a judgment or decree for a part of his money back. Under the doctrine of mutuality of remedy, the vendor is entitled to a decree for specific performance against the vendee.[20] Therefore if after default the vendee seeks relief, the option should be in the vendor to choose whether he will submit to specific performance of the contract, or to a rescission thereof accompanied by a repayment to the vendee of so much of the purchase price already paid as exceeds a fair sum as damages for the vendee's breach of contract. It is only fair to the vendor to give him this option, for he is not a contract-breaker and he is the best judge of the manner in which he can obtain just relief. When it is considered that in the majority of cases the vendors are large home-building corporations, or individuals controlling huge tracts divided into home sites, and that the vendees are frequently persons who do not clearly comprehend the legal significance of the document (which often contains printed clauses that are never noticed), the injustice of enforcing a penalty against the vendee is evident.

EFFECT UPON A PRIOR AND EXISTING WILL OF THE REVOCATION OF A SUBSEQUENT WILL CONTAINING AN EXPRESS REVOCATORY CLAUSE

In the absence of statute, the destruction, *animo revocandi*, of a will

[19] Even at law in a number of American jurisdictions a contract-breaker has been allowed to recover instalments due him upon a contract. *Britton v. Turner* (1834) 6 N. H. 481; Woodward, *Quasi-Contracts* (1913) sec. 174 *et seq.*

[20] In equity, if the vendee can have specific performance, the vendor ought also to be able to obtain it. 5 Pomeroy, *Equity* (5th ed. 1918) sec. 2169.

containing a revocatory clause, leaving in existence a prior will, has the effect of re-establishing the prior will as the last will and testament of the testator. This principle is old, sound, and logical, but it has long been obscured by a mass of careless statements in text-books, and ill-considered *dicta* in judicial opinions.

One of the causes of this unfortunate clouding of the common-law rule is an early Connecticut case[1] which rests squarely upon the fundamental and elementary principle that a will is ambulatory. It is poetic justice that the Supreme Court of Errors of Connecticut should clear up the confusion for which it was in part responsible. This it did in the recent case of *Whitehill v. Halbing* (1922) 98 Conn.—; 118 Atl.—. In this case the testatrix executed a will in 1914. A later will, executed in 1919, containing the customary revoking clause, was destroyed by her with the knowledge that the earlier will was still in existence. After her death the 1914 will was presented for probate. The contestants claimed that she had died intestate by reason of the revocation of the 1914 will by the revocatory clause in the destroyed will. The Probate Court admitted the 1914 document as her last will and testament. Upon appeal the Superior Court directed a verdict for the proponent, and the Supreme Court[2] (Mr. Justice Wheeler *dissenting*) found no error.

Many writers have dismissed this problem with the statement that there is a hopeless conflict among the American authorities.[3] This, as later pointed out, seems incorrect, and a few of the text-writers have so stated.[4] Unfortunately, however, some courts have repeated the statement without carefully considering the effect of statutes upon the problem.[5]

A careful investigation has failed to disclose any reported case, except the early Connecticut case above referred to, either in this country or in England, in which it has been held that the revocation of a will containing a revoking clause leaves the estate intestate if the prior will is in existence at the death of the testator, unless such decision is affected by, and explainable because of, a controlling statute. The exception, the

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[1] *James v. Marvin* (1819) 3 Conn. 576.

[2] The Supreme Court said in part: "Upon these facts the only conclusion which the jury could reasonably have reached was that the will of 1919, with its clause of revocation, did not immediately and finally take effect to revoke the will of 1914; that when she destroyed the will of 1919, the testatrix left the will of 1914, which she was carefully keeping in existence, in force as her will; and that no other will having been found, the will of 1914 was the only written declaration relating to the disposition of her property which subsisted at her death."

[3] 1 Underhill, *Wills* (1900) 367; Page, *Wills* (1901) 304; Woerner, *Law of Decedents' Estates* (1913) 41; Schouler, *Wills* (5th ed. 1915) 516; 1 Alexander, *Wills* (1917) 755; 1 Jarman, *Wills* (Bigelow's 6th ed. 1893) 162, note; Powell, *Devises* (1806) 55; 40 Cyc. 1214; 28 R. C. L. 195.

[4] Thompson, *Wills* (1916) 420; 1 Redfield, *Wills* (1876) 328.

[5] *In re Gould's Will* (1900) 72 Vt. 316, 47 Atl. 1082; *Lane v. Hill* (1895) 68 N. H. 275, 44 Atl. 393.

old Connecticut case of *James v. Marvin*,[6] was severely criticized by Redfield,[7] and, as the Connecticut Supreme Court has just declared, has not been the law in Connecticut since 1821.

In England, before 1837, when the Statute of Wills[8] was enacted, providing that no will once revoked might be revived except by a re-execution thereof or by a codicil expressly providing for its revival, there were two rules: (1) the *Ecclesiastical Rule*, which sought for and gave effect to the testator's intention at the time of the revocation of the will containing the revoking clause;[9] and (2) the *Common-Law Rule* (known also as *Lord Mansfield's Rule*), which declared that the first will was ipso facto re-established upon the revocation of the revoking will.[10]

This statute and similar statutes in the United States are in derogation of these rules.[11] In those states where no statute affecting this subject has been enacted, either the *Ecclesiastical* or the *Common-Law Rule* obtains.[12] In many of the states, however, there are statutes which control. These statutes fall into two classes. Some of them are actual or substantial re-enactments of the English statute of 1837.[13] Others provide that a will may be revoked not only by a later will or codicil but by some "other writing."[14]

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[6] *Supra* note 1.

[7] Redfield, *loc. cit.*

[8] (1837) 1 Vict. c. 26, sec. 22.

[9] *Helyar v. Helyar* (1754, Prerog.) 1 Lee, 472.

[10] *Harwood v. Goodwright* (1774, K. B.) 1 Cowp. 86; *Glazier v. Glazier* (1770, K. B.) 4 Burr. 2512.

[11] *Ross v. Woolard* (1907) 75 Kan. 383, 89 Pac. 680.

[12] *Moore v. Rawlett* (1915) 269 Ill. 88, 109 N. E. 682; *Stetson v. Stetson* (1903) 200 Ill. 601, 66 N. E. 262; *Bates v. Hacking* (1908) 29 R. I. 1, 68 Atl. 622; *Blackett v. Ziegler* (1911) 153 Iowa, 344, 133 N. W. 901; *Marsh v. Marsh* (1855) 48 N. C. 77; *Taylor v. Taylor* (1820, S. C.) 2 Nott & McC. 482; *McClure v. McClure* (1887) 86 Tenn. 173, 6 S. W. 44.

[13] The New York statute is typical of this class: "If after making any will the testator shall duly make and execute a second will, the destruction, cancelling, or revocation of such second will shall not revive the first will unless it appear by the terms of such revocation that it is his intention to revive and give effect to the first will, or unless . . . . he shall duly republish his first will." N. Y. Cons. Laws, 1909, 505. See also Ky. Sts. 1915, ch. 135, sec. 4834; Va. Code, 1919, sec. 5234; Deering's Calif. Civ. Code, 1915, sec. 1297; Ga. Code, 1911, sec. 3917; Burns' Ind. Sts. 1914, sec. 3115; Kan. Gen. Sts. 1915, ch. 126, sec. 11794; Mo. Rev. Sts. 1919, ch. 1, sec. 513; Or. Laws, 1920, sec. 10104; Remington's Wash. Comp. Sts. 1922, sec. 1405; S. D. Rev. Code, 1919, sec. 628.

[14] This type of statute is exemplified in Michigan: "No will . . . . shall be revoked, unless by burning . . . . , or by some other will or codicil in writing, executed as prescribed in this chapter; or by some other writing, signed, attested and subscribed in the manner provided in this chapter for the execution of a will . . . ." Mich. Comp. Laws, 1915, ch. 226. sec. 9. See also Tex. Rev. Civ. Sts. 1911, art. 7859; Wis. Sts. 1921, ch. 103, sec. 2290; Minn. Gen. Sts. 1913, ch. 74, sec. 7256; Purdon's Pa. Digest, 1910, p. 5130.

Under the latter class of statutes, some courts have held that since the revocation of a will may be effected by a non-testamentary document, merely including the revocatory document in a will does not make that clause ambulatory.[15] Other courts, construing similar statutes, have declared that when the testator chooses to effect the revocation of a prior will by a clause in a subsequent will, the revocation, like the rest of the will, is ambulatory.[16] The decision in *James v. Marvin*[17] was justified by a rule of law, independent of statute, which before 1821 permitted the revocation of a will in Connecticut, not only by a writing not testamentary, but even by parol.[18]

In 1821 was enacted the Connecticut Statute of Wills,[19] which in substance has continued in force to this day. By force of this statute the power to revoke a will by a writing not testamentary in character is taken away; revocation can be accomplished only by "a later will or codicil." After the enactment of this statute, *James v. Marvin*[20] ceased to be the law in Connecticut, and the Supreme Court has so intimated more than once.[21]

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[15] *Danley v. Jefferson* (1908) 150 Mich. 590, 114 N. W. 470; *Cheever v. North* (1895) 106 Mich. 390, 64 N. W. 455; *In re Cunningham* (1888) 38 Minn. 169, 36 N. W. 269; *Hairston v. Hairston* (1885) 30 Miss. 276; *Bohanon v. Walcott* (1836, Miss.) 1 How. 336; *In re Noon* (1902) 115 Wis. 299, 91 N. W. 670.

[16] *In re Diament's Estate* (1915) 84 N. J. Eq. 135, 92 Atl. 952; *Colvin v. Warford* (1863) 20 Md. 357; *Williams v. Miles* (1903) 68 Neb. 463, 94 N. W. 705; *In re Gould's Will, supra* note 5; *Pickens v. Davis* (1883) 134 Mass. 252; *Williams v. Williams* (1886) 142 Mass. 515, 8 Atl. 424; *Lane v. Hill, supra* note 5.

[17] *Supra* note 1.

[18] *Witter v. Mott* (1816) 2 Conn. 67; *Card v. Grinnan* (1821) 5 Conn. 164. Hosmer, C. J. said in the case of *James v. Marvin, supra* note 1, at p. 578: "A deed of revocation separate from a will has the effect of annulling a prior will, instantaneously; and the operation is the same whether the revoking clause be in a deed or will; for it is never a necessary part of the latter."

[19] Conn. Gen. Sts. 1918, ch. 254, sec. 4946.

[20] *Supra* note 1.

[21] *Fitzpatrick v. Cullinan* (1913) 87 Conn. 579, at p. 584, 89 Atl. 92, at p. 94: " . . . . It is therefore unnecessary to determine the question, left undecided in *Peck's Appeal,* whether, under our present statute, such a revoking clause would take effect immediately, so that the subsequent destruction of the second will with intent to revive the first would be ineffectual without a republication of the first will." See also *Peck's Appeal* (1883) 50 Conn. 562; *Security Co. v. Snow* (1898) 70 Conn. 288, 39 Atl. 153. In the instant case the court said in part: "It would be difficult to demonstrate logically that an express revocatory clause was not a legal expression of the testator's intention respecting the disposition of his property after death, made known through a written declaration, to which the law will give effect only after his death and execute as his will . . . . . If this declaration of intention is not a will, by the terms of statutes no will is revoked by it. If it is a will, it must have the essential quality of a will which is expressed by the word ambulatory. Page on Wills, p. 49. 'It is this ambulatory quality which forms the characteristic of wills.' 1 Jarman on Wills (6th Ed.) p. 18 . . . . .

"This principle of law was so strongly entrenched in England that a statute was needed to dislodge it. In 1837, the Parliament decreed that no will or codicil, nor any part thereof, which shall be in any manner revoked, shall be revived other-

Although the logic of this decision seems unassailable, the fact that the legislative trend has been in the other direction may encourage adverse criticism on the theory that harmony is peculiarly desirable in this field. The wisdom of the legislation prevailing in this country is, however, extremely doubtful, for the decisions have not been uniform[22] under the type of statute[23] providing for a revocation by some "other writing."

Wills may easily be, and frequently are, executed and later destroyed in secret. The witnesses to the revoking will would not necessarily know of the testator's death, and even though they should happen to know about it, they would not be likely to examine the will offered for probate and make known that a later will had been executed. Even if there were rare cases where witnesses whose keen sense of duty would lead them to do this, whether the second will contained a revocatory clause or not would still be an open question of fact, since it is infrequent that a copy of the revoked will is available. Thus, where the rule is that a revocation by will is instantaneous, it must necessarily frequently happen that a revoked will is probated merely because the execution of the subsequent will (later destroyed) is never brought to the attention of the probate court.

It is clear that the common-law rule is much simpler of application. The will bearing the latest date having been offered for probate, it may safely be admitted without the disturbing possibility that the testator might at some time have revoked that will by a later testament which was also revoked by burning or tearing. Under this rule it is assumed as a matter of law, after a thorough search has shown that no later will is in existence, that the existing document is an expression of the testator's last desires; under the other rule the legal assumption is either directly contrary, or the matter is entirely indefinite. Even though there may be cases in which the existence at the testator's death of the prior will may be due to accident or oversight, the common-law doctrine has the merit of stating a definite legal rule which it seems will more often than not coincide with the testator's desires.

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wise than by a re-execution thereof, or by a codicil executed as required by the Act and showing an intention to revive the same. 1 Victoria, Chap. 26, Sec. 22. This statute in substance has been adopted in many of the United States, including New York, Indiana, Ohio, Kansas, Missouri and California. The decisions of the courts of these States are controlled by such legislation, and have therefore no direct bearing upon the subject of revivor in Connecticut, where no statute has been enacted. In Massachusetts, Vermont, New Hampshire, Maryland, Michigan, Minnesota and Pennsylvania, the statute permits wills to be revoked by 'some other writing' than a will, if it be executed in the manner provided for the execution of wills. This, as we have seen, has not been the law of Connecticut since 1821 . . . . . Decisions which are compelled or conclusively influenced by such local laws, necessarily have little weight in our courts where no similar law is now in force."

[22] *Supra* notes 15 and 16.

[23] *Supra* note 14.

[Note. In an able dissenting opinion received after the above comment had been printed, Chief Justice Wheeler attempts to demonstrate that *James v. Marvin, supra,* "one of the notable contributions of constructive legal reasoning in our reports," is "established by the overwhelming weight of authority in this country, judicial and legislative as well." To the point that "Lord Mansfield's rule has been thoroughly disapproved in this country as well as in England," he cites, *inter alia,* Schouler, *op. cit.* sec. 415, note; COMMENTS (1912) 21 YALE LAW JOURNAL, 672. He also differs from his associates as to the effect of the Connecticut Statute of 1821. The recent case of *In re Tibbetts' Estate* (1922, Minn.) 189 N. W. 401, is in accord with the majority view in the principal case. Ed.]

THE PRIVILEGE OF A PUBLIC UTILITY TO WITHDRAW FROM SERVICE

When private property is "affected with a public interest, it ceases to be *juris privati only.*"[1] Land and chattels devoted to the public service are subject to special rules; property in them is subject to limitations not existing in the case of purely private ownership. Public servants are likewise subject to special control; they have fewer privileges and heavier duties than other persons. Such special burdens and control may, of course, be made so heavy as to react against the public welfare and defeat their own ends. Thus a rule absolutely forbidding a public utility to withdraw from the public service would operate oppressively and would prevent men from entering such service at all. In particular is this true where the utility contemplates a partial withdrawal only.[2]

When there is no grant from the state, but a mere holding out to serve the public as in the case of innkeepers[3] or common carriers by wagon,[4] it has long been settled that mere cessation of business will con-

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[1] Lord Hale in his treatise *De Portibus Maris,* 1 HARG. LAW TRACTS, 78. "When one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use." Waite, C. J., in *Munn v. Illinois* (1876) 94 U. S. 113, 126.

[2] Wyman, *Public Service Corporations* (1911) sec. 290.

[3] *Anonymous* (1623) Godbolt, 345, where it was said: "If an Inn-keeper taketh down his Signe, and yet keepeth a hosterie, an Action upon the Case will lie against him, if he do deny lodging unto a travailer for his money; but if he taketh down his Signe, and giveth over the keeping of an Inn, then he is discharged from giving lodging." In *Rex v. Collins* (1623) Palmer, 373, it is said that "an innkeeper may at his pleasure demolish his sign and leave off innkeeping." And in *Conklin v. Prospect Park Hotel Co.* (1888) 48 Hun, 619, 1 N. Y. Supp. 406, it was intimated that after a sale of his business an innkeeper would not be under any further duty.

[4] *Satterlee v. Groat* (1828, N. Y.) 1 Wend. 272. The defendant was a common carrier by wagon between Schenectady and Albany previous to 1819, but had given up the business. The court said: "The defendant stood upon the same footing as though he had never been engaged in the forwarding business. He had abandoned it entirely."